

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

September 10, 2004 Session

WENDY D. CLIBURN, ET AL. v. FRANKIE DALE SULLIVAN

Appeal from the Circuit Court for Davidson County
No. 02C-1056 Walter C. Kurtz, Judge

No. M2003-02563-COA-R3-CV - Filed February 7, 2005

This is a dispute between divorced parents over the division of settlement proceeds awarded for the wrongful death of their seventeen year old son. The decedent's mother filed the wrongful death action. She settled the claim for \$325,000. Shortly thereafter, the father sought to intervene claiming entitlement to half of the settlement. The mother objected, asserting that Tenn. Code Ann. § 20-5-107(c) barred the father's claim since he failed to pay court-ordered child support, visit or contact his child for more than two years prior to the child's death. The father countered arguing the statute became effective after his rights vested and thus could not be applied retrospectively. The trial court held that the father's rights vested at the child's death, which predated the amendment to Tenn. Code Ann. § 20-5-107(c), and therefore the statute did not apply. The trial court awarded the father half of the settlement. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., and WILLIAM B. CAIN, J., joined.

Andrea E. Phelan, Donald N. Capparella, and Phillip H. Miller, Nashville, Tennessee, for the appellant, Wendy D. Cliburn, et al.

C. Tracey Parks and Sharon Linville, Nashville, Tennessee, for the appellee, Rogers Group, Inc., et al. and Frankie Dale Sullivan, Intervener.

OPINION

This is a dispute between divorced parents over the settlement proceeds awarded for the wrongful death of their son, Jedidiah Lee Sullivan, who was killed in July of 2001 in a motor vehicle accident. Jedidiah was seventeen years old when he died. He had no children and no spouse. He was survived by the parties, his mother and father.

To comprehend the depth of the conflict between these parties, a brief history is necessary. Mother and Father divorced in August of 1987. Mother was awarded custody of their son, Jedidiah,

and Father was ordered to pay child support of \$30 per week. Father paid no child support for nine years preceding his son's death. The last payment was in February of 1993.¹ Moreover, Father had not seen Jedediah since 1995.

Mother filed a wrongful death action in April 2002. She settled the wrongful death claim for \$325,000 in June 2003. Father did not participate in the wrongful death action or the settlement.² After the settlement was reached and the case voluntarily dismissed, Father filed a motion to intervene asserting that he had a statutory right as the decedent's father, pursuant to Tenn. Code Ann. § 20-5-106(a), to half of the wrongful death settlement.³ The trial court granted Father's motion to intervene. It also amended its order dismissing the wrongful death action so as to reserve the issue of distribution of the wrongful death settlement proceeds between the parents.⁴

Both parties filed motions for summary judgment regarding whether Father was entitled to recover one half of the wrongful death settlement. Mother argued that Tennessee's wrongful death statute, specifically Tenn. Code Ann. § 20-5-107(c), barred a parent, such as Father, who had failed to pay court-ordered child support, visit or contact his child for more than two years prior to the child's death, from recovering in a wrongful death action. Conversely, Father asserted that Tenn. Code Ann. § 20-5-107(c) did not become effective until after his right to the wrongful death proceeds had vested, and it could not be applied retrospectively. The effective date of Tenn. Code Ann. § 20-5-107(c) was April 11, 2003. Father argued that his right to the wrongful death proceeds, pursuant to Tenn. Code Ann. § 20-5-106(a), vested prior to the amendment, either at Jedediah's death, July of 2001, or when Mother filed the wrongful death action, April of 2002.

The trial court denied Mother's motion for summary judgment, but granted Father's motion holding that Tenn. Code Ann. § 20-5-106(a) controlled and the amendment to Tenn. Code Ann. § 20-5-107(c), effective April 11, 2003, could not be applied retrospectively:

Mr. Sullivan's right to recover part of the damages awarded for his son's death vested on the day of his son's death pursuant to Tenn. Code Ann. §§ 20-5-106(a) and 20-5-107 prior to the 2003 amendment to section 20-5-107. See Grisman

¹On September 2, 2003, the Macon County Circuit Court determined that Father owed Mother \$30,369.99 in child support.

²Father asserts that he attempted to participate in the wrongful death action, but his efforts to do so were thwarted by Mother and her attorney.

³When a minor dies, the right of action arising therefrom, which the decedent would have had against the wrongdoer but for death, passes to the decedent's next of kin. Tenn. Code Ann. § 20-5-106(a). Since Father and Mother are the only next of kin, Father insists he is entitled to half of the settlement.

⁴The wrongful death action was voluntarily dismissed on June 9, 2003. The trial court's order, amending the order of dismissal, allowing Father to intervene and reserving the issue of the proper distribution of the settlement proceeds, was dated July 11, 2003.

v. Curtiss⁵, 785 S.W.2d 353 (Tenn. 1990) (Statute limiting damages passed after the accident cannot be applied retroactively.) In addition, statutes are construed to operate prospectively in the absence of clear legislative intent to the contrary. See Pacific Eastern Corp. V. Gulf Life Co., 902 S.W.2d 946, 956 (Tenn. Ct. App. 1995).

Because Tenn. Code Ann. § 20-5-107(c) cannot be retroactively applied, this Court is bound by prior applicable case law. Accordingly, Mr. Sullivan's right to share in the proceeds, in this case, rests upon the facts that he is Jedidiah's natural father and that Ms. Cliburn was awarded a settlement; his parental irresponsibility is not a factor. See Spurling, 747 S.W.2d at 352-53.

Father was awarded half of the \$325,000 settlement proceeds, minus attorney fees, child support arrearage, and funeral expenses.⁶ Thereafter, upon Mother's motion to apply the common fund doctrine, the trial court assessed half of the contingent legal fees against Father's share of the proceeds.

Both parties appeal. Each presents one issue. Mother asserts that Tenn. Code Ann. § 20-5-107(c) bars Father's claim. Father asserts that the trial court erred by applying the common fund doctrine.

Standard of Review

The question of whether Tenn. Code Ann. § 20-5-107(c) bars Father from recovering was brought to the trial court's attention by the parties' cross motions for summary judgment. Summary judgments are proper in almost any civil case that can be resolved on the basis of legal issues alone. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Psillas v. Home Depot, U.S.A., Inc.*, 66 S.W. 3d 860, 863 (Tenn. Ct. App. 2001). Summary judgments are not appropriate, however, when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Consequently, a motion for summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support the conclusion that the party seeking the summary judgment, the moving party, is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Goodloe v. State*, 36 S.W.3d 62, 65 (Tenn. 2001).

Summary judgments enjoy no presumption of correctness on appeal. *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001). Accordingly, we must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997); *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

⁵The case reference by the trial court is actually titled *Crisman v. Curtiss*, 785 S.W.2d 353 (Tenn. 1990).

⁶Father owed Mother \$30,369.99 for child support, pursuant to a September 10, 2003 order from the Macon County Circuit Court, Case No. 241.

We must consider the evidence in the light most favorable to the non-moving party, and all inferences must be drawn in that party's favor. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). When reviewing the evidence, we must first investigate whether a factual dispute exists. If we find that a factual dispute exists, we must determine if the fact is material to the claim or defense upon which the summary judgment is based and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214.

Wrongful Death Statutes

Tenn. Code Ann. § 20-5-107(c), amended effective April 11, 2003, reads:

Notwithstanding any provision of law to the contrary, a parent who has intentionally refused or neglected to pay any support for a child for a two-year period, or for the life of the child, whichever is less, when subject to a court order requiring the payment of child support and who has intentionally refused or neglected to contact the child or exercise visitation during such period, shall not be permitted to recover through an action commenced pursuant to section 20-5-106 and section 20-5-107(a).

This statute is the basis upon which Mother relies to deny Father's claim. Father contends the statute does not apply to his claim because it became effective after his entitlement to the wrongful death action vested. Father contends his right vested either at Jedidiah's death or when Mother filed the wrongful death action, both of which predate the effective date of the amendment to Tenn. Code Ann. § 20-5-107(c).

Article I, § 20 of the Tennessee Constitution provides that "no retrospective law, or law impairing the obligations of contract, shall be made." The Tennessee Supreme Court has interpreted this constitutional provision to prohibit laws that "take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978). The court also defined a "vested right" as one "which it is proper for the state to recognize and protect and of which [an] individual could not be deprived arbitrarily without injustice." *Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999) (quoting *Morris*, 572 S.W.2d at 905.) Furthermore, "It is well settled that a vested right of action is as much property as are tangible things and is protected from arbitrary legislation, whether such right of action be based upon the law of contract or upon other principles of the common law." *Morris*, 572 S.W.2d at 905.

The determination of whether a vested right exists and whether it has been impaired by an application of a retrospective statute involves the consideration of many factors. *Doe*, 2 S.W.3d at 924. The following factors, none of which is dispositive, are useful in this determination: (1) whether the public interest is advanced or impeded, (2) the extent to which the retroactive provision gives effect to or defeats the reasonable expectations of affected persons, (3) whether the statute

comes as a surprise to persons who have long relied on a contrary state of law, and (4) whether the statute appears to be procedural or remedial. *Id.* at 924.

The trial court applied the above analysis and concluded that Father had a vested right to the wrongful death settlement proceeds prior to the effective date of the amendment to Tenn. Code Ann. § 20-5-107(c) and that the amendment could not be applied retrospectively. The trial court reasoned that, “[A] parent’s right to recover for his or her child’s wrongful death is more than merely a procedural or remedial right and that, given existing case law, retroactive application of the new amendment defeats the original statutory effect of allowing parental recovery.” We agree.

Father’s right to the proceeds vested on July 27, 2001, the day of Jedidiah’s death. *Crismon v. Curtiss*, 785 S.W.2d 353 (Tenn. 1990); Tenn. Code Ann. §20-5-106(a). The long-standing rule is that absent clear legislative intent to the contrary, courts generally construe statutes to operate prospectively. *Pacific Eastern Corp. v. GulfLife Holding Co.*, 902 S.W.2d 946, 956 (Tenn. Ct. App. 1995); *Jennings v. Jennings*, 54 S.W.2d 961 (Tenn. 1932) (instructing that statutes are to be construed prospectively, unless the Legislature’s intent to give them a retrospective effect is expressly declared or implied.). The application of Tenn. Code Ann. § 20-5-107(c) would affect a vested right and thus cannot be applied retroactively.

The Common Fund Doctrine

The well-established rule is that attorneys must look solely to their own client for the payment of attorney fees. *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002). The rule, known as the American Rule, applies even in those circumstances where an attorney’s work assists a person with whom no attorney-client relationship exists. Seth M. McNamee, *Professional Responsibility – Kline v. Eyrich: Use of the Common Fund Doctrine in Wrongful Death Actions in Tennessee: Proventing Unjust Enrichment or Simply Unjust*, 34 U. Mem. L. Rev. 233, 235-236 (2003). An exception to this principle is the common fund doctrine. Under the common fund doctrine, a party who has secured, augmented, or preserved property or a fund of money in which other people are entitled to share, may oblige the beneficiaries of that common property or common fund to contribute to his or her legal fee and may deduct that fee directly from the fund or property. *Id.* at 236; *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 589-90 (Tenn. 1976). The rationale behind the common fund doctrine is that it prevents the beneficiaries of legal services from being unjustly enriched by requiring them to pay for those services from which they benefitted. *Kline*, 69 S.W.3d at 204.

The hiring of separate counsel, as Father did, may prevent the application of the common fund doctrine, but that is not always the case.

Plainly stated, unless the separate counsel meaningfully participates in acquiring, preserving, or increasing the common fund, *see Montcastle v. Baird*, 723 S.W.2d 119, 123 (Tenn. Ct. App. 1986), the beneficiary may be obliged to pay fees to the original or lead counsel in addition to those fees payable to the separate counsel.

These circumstances can arise when (1) the original or lead counsel was responsible for the "lion's share" of work in acquiring, preserving, or increasing the common fund, *Hobson*, 801 S.W.2d at 809; (2) the work of separate counsel inured only to the benefit of a single beneficiary, and not to the fund itself, *Gilpin v. Burrage*, 188 Tenn. 80, 90, 216 S.W.2d 732, 737 (1948); *Merchants & Planters Bank v. Myers*, 644 S.W.2d 683, 688 (Tenn. Ct. App. 1982); or (3) the separate counsel was hired expressly to advocate interests contrary to those of the common fund.

Kline, 69 S.W.3d at 204-205.

There are exceptions to the foregoing, the most notable being insurance subrogation actions. *See Travelers Insurance Co. v. Williams*, 541 S.W.2d 587, 590 (Tenn. 1976) (holding an attorney representing a plaintiff, whose own insurance company has a subrogation interest against third parties, is not entitled to an attorney's fee from the subrogation interest unless the insurance company has expressly or impliedly employed him to pursue the subrogation interest) *See also Boston, Bates & Holt v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d 32 (Tenn. 1993).⁷ In subrogation cases, the insurance company has the right to participate, through its own counsel, in the underlying tort action against the third party to protect its subrogation interest, because its interest is distinct from that of the insured, who has been indemnified, at least in part, for his or her expenses. Each is seeking to recover its separate and distinct fund, thus there is no common fund. In a wrongful death case, such as this, there can be only one recovery, because there is only one cause of action for wrongful death, which is the cause of action the deceased would have had if the deceased had survived. *Ki v. State*, 78 S.W.3d 876, 879-880 (Tenn. 2002).⁸ Father's share and Mother's share are not distinct or severable prior to the resolution of the action against our third party tortfeasor. Their interest in the action is to share in the recovery of the common fund as the statute provides. Moreover, the wrongful death statute identifies who may bring such an action and instructs that the action is brought by that person on behalf of all who are entitled to share in the recovery. *See* Tenn. Code Ann. § 20-5-106(a) and § 20-5-107(a). Thus Father's intervention, with or without counsel, would not only be unnecessary, it would be improper unless he could show that Mother was not pursuing the wrongful death claim in good faith, and there is no evidence of that in this case.

⁷For yet a different rule pertaining to attorney fees in actions to recover TennCare benefits see Tenn. Code Ann. § 71-5-117; *see also Roberts v. Sanders*, No. M1998-00957-COA-R3-CV, 2002 WL 256740, at *9 (Tenn. Ct. App. Feb. 22, 2002) (holding the procedure now specifically required by Tenn. Code Ann. § 71-5-117(g)-(k) requires that the "reasonable attorneys" fees and litigation costs incurred by the plaintiff [TennCare recipient] in obtaining the recovery shall be deducted from the amount of the State's subrogation interest and that the remaining funds, called the "net subrogation interest," shall be paid over to the State or its "assignee" under Tenn. Code Ann. § 71-5-117(f)).

⁸In a wrongful death suit only one right of action exists: the action that the decedent would have had, absent death, against the negligent wrongdoer. *Ki*, 78 S.W.3d at 879. The decedent is the sole party who holds a right of action or claim in a wrongful death suit. *See Lynn v. City of Jackson*, 63 S.W.3d 332, 336 (Tenn. 2001) (stating that, "Tennessee's wrongful death statute does not create a new cause of action for the beneficiaries but instead preserves the right of action of the decedent."). "The decedent's survivors are only asserting the decedent's right of action on behalf of the decedent. Accordingly, because Tenn. Code Ann. § 20-5-106(a) creates one claim or right of action vested in the decedent, the decedent is the sole 'claimant' in a wrongful death action." *Ki*, 78 S.W.3d at 880.

When Mother filed this wrongful death action, she entered into a one-third contingency fee agreement with her attorney. Once the trial court held that Father was entitled to half the settlement, Mother asked the trial court to apply the common fund doctrine and thus deduct half of the one-third contingency fee, \$54,112.50, from Father's share. In support of her motion, Mother asserted she "independently maintained this lawsuit, receiving no help toward the advancement or settlement . . . from counsel for father." Father objected asserting that the fee was unreasonable, that Mother's attorney did not work on Father's behalf and that Father was forced to hire independent counsel to represent his interests in this matter. Father requested a hearing on the reasonableness of the requested fee.

The trial court applied the common fund doctrine and thus deducted half of the fee, \$54,112.50, from Father's share of the settlement. The court also denied Father's request for a hearing on the fee issue. It explained its decision denying the request for a hearing stating,

The judge is no stranger to evidentiary hearings related to the reasonableness of fees . . . but when dealing with contingent fees, I don't think – I think I feel confident, on the record before me, that the contingent fee of one-third is warranted. We don't need an evidentiary hearing on this factual record, under these circumstances.

Father contends that the trial court abused its discretion when it applied the common fund doctrine. He asserts that his attempts to participate in the wrongful death suit were thwarted by Mother's attorney, that Mother's attorney refused to acknowledge Father's interest in the wrongful death proceeds and promised, "to litigate and appeal any and all rulings that might give him even a sliver of this recovery." Father also cited post-mortem petitions in an attempt to terminate Father's parental rights. Father asserts that Mother's counsel, by proceeding in this adversarial manner, caused him to hire separate counsel and incur additional expenses; therefore, he contends it would be unjust to require that he pay half of her legal fees.

Absent an abuse of discretion, we will not intervene with the trial court's decision concerning an award of attorney fees. *Garfinkle v. Garfinkle*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996).

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning or that cause[s] an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Mother's attorney was solely responsible for the legal work leading up to the settlement. Neither Father or his attorney assisted in that endeavor; yet, Father benefitted from the legal services

rendered by Mother's attorney. Admittedly, Father and Mother went to war over the issue of Father's entitlement to a portion of the proceeds. Nevertheless, but for the legal services of Mother's attorney, there would have been no proceeds over which to fight. The dispute with Mother concerning Father's entitlement to share in the settlement proceeds that had already been obtained was distinct from the claim Mother pursued, with the aid of her attorney, for the wrongful death of the parties' son. Thus, the legal fees Father incurred did not pertain to the claim against the third party tortfeasor that was responsible for the wrongful death of his son; they only pertained to Father's legal entanglement with Mother, which was subsequent to the settlement of the wrongful death claim against the third party tortfeasor. Accordingly, we affirm the trial court's application of the common fund doctrine requiring Father to bear half of the legal fees incurred to effect the wrongful death settlement.

Contingency Fee

Father also challenges the reasonableness of awarding a one-third contingency fee. Although the trial judge denied Father's request for a hearing on the reasonableness of the fee, it is clear that the trial judge was very familiar with the underlying scenario. The trial court stated:

[O]bviously, the Judge is no stranger to evidentiary hearings related to the reasonableness of fees, especially as they relate to the *Connors* verses *Connors*⁹ factors, under the former Code of Professional Responsibility and, now, the new Code, but when dealing with contingent fees, I don't think – I think I feel confident, on the record before me, that the contingent fee of one-third is warranted. We don't need an evidentiary hearing on this factual record, under these circumstances.

In other cases, I actually do need to hear live testimony, but this isn't one of those. I think the record is sufficient for me to make this judgment.

We are not required to reverse a fee award simply because the record does not contain proof establishing the reasonableness of the fee. *Kline*, 69 S.W.3d at 210. The record before us is more than sufficient to establish that a contingent fee of one third was reasonable. Thus, we affirm the trial court on this issue as well.

⁹ *Connors v. Connors*, 594 S.W.2d 672, (Tenn. 1980) instructs that the following factors are to be considered when considering the reasonableness of attorney fees:

1. The time devoted to performing the legal service.
2. The time limitations imposed by the circumstances.
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The experience, reputation, and ability of the lawyer performing the legal service.

Id. at 676-77.

In Conclusion

The judgment of the trial court is affirmed in all respects. This matter is remanded to the trial court and costs of appeal are assessed the appellant, Wendy Cliburn.

FRANK G. CLEMENT, JR., JUDGE